DAMAI CITY SDN BHD v. GRAND DYNAMIC BUILDERS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIEF EMRAN ARIFIN J
[ORIGINATING SUMMONS NO: WA-24NCC-465-08-2023]
2 JANUARY 2024

Abstract – *A restraining order under ss. 366 and 368 of the Companies Act 2016 can be set aside if the parties who applied for it can show that the party who applied for the said restraining order ('applicant') failed to comply with the mandatory requirements under ss. 366(3) and 368(2) of the same Act because: (i) the applicant had wrongly included relevant companies/parties as part of the group of general creditors; and (ii) the proposed scheme of arrangements is bound to fail, as the creditors, whose total claim exceeded 30% of the total debts admitted by the applicant, are opposing the proposed scheme.*

COMPANY LAW: *Arrangement, scheme of – Restraint of proceedings – Setting aside – Company suffering from significant cash flow issues appointed scheme advisor to formulate scheme of arrangements ('proposed scheme') – Company applied for restraining order under ss. 366 and 368 of Companies Act 2016 ('CA') – Restraining order, which was allowed, opposed by creditors whose total claim exceeded 30% of total debts admitted by company – Whether company complied with mandatory requirements under ss. 363(3) and 368(2) of CA – Whether company wrongly included related companies/parties as part of group of general creditors – Whether proposed scheme bound to fail*

The applicant, Damai City Sdn Bhd, was a company involved in the business of property development. The interveners/respondents ('interveners'), *ie*, Grand Dynamic Builders Sdn Bhd ('first intervener'), MCC Overseas (M) Sdn Bhd ('second intervener') and Malayan Banking Bhd, were among the creditors of the applicant for its project known as '8 Conlay' ('project'). Pursuant to the Covid-19 pandemic, movement control orders and contractual disputes with its creditors, the applicant failed to complete the project within its timeline. As a result, the applicant had to suffer significant cash flow issues which adversely reduced its revenue and depleted its cash reserves. The applicant's statement of affairs as of 22 August 2023 showed that its estimated realisable value of assets stood at RM248,707,453, whilst the amount admitted being due to its creditors stood at RM783,981,096. This prompted the applicant, among others, to appoint a scheme advisor to formulate a scheme of arrangements to address its financial predicament ('proposed scheme'). To bring the proposed scheme to the attention of its creditors for their consideration and approval, the applicant then filed to the

court for a restraining order under ss. 366 and 368 of the Companies Act 2016 ('CA'), which would allow the applicant to convene a creditors' meeting under s. 366 of the CA and prevent the creditors from commencing any proceedings against the applicant within the period of three months from the date the restraining order was allowed ('restraining order application'). This restraining order application was subsequently allowed by the court on 1 September 2023. Aggrieved, the interveners, other than applying for the applications to intervene in these proceedings ('application to intervene'), also applied for the setting aside of the restraining order (by the first and second interveners) ('setting aside application'). Among the issues raised for the setting aside application were: (i) whether the mandatory requirements under ss. 366 and 368 of the CA, in particular s. 368(2) of the CA, had been complied with by the applicant in applying for the restraining order; and (ii) whether the proposed scheme of arrangements was bound to fail as it would not pass the threshold required under s. 366(3) of the CA considering that the first and second interveners, whose total claim exceeded 30% of the total debts admitted by the applicant, would oppose the proposed scheme.

Held (allowing application to intervene; allowing setting aside application):

(1) The application to intervene was not objected to by the applicant. It was therefore allowed. (para 10)

(2) The applicant failed to comply with the mandatory requirements under s. 368(2) of the CA. The applicant had wrongly included related companies/parties into the group of general creditors. The applicant should have categorised these creditors as a separate group of creditors from other independent creditors as these related creditors' interests would not be in line with the interests of other creditors. Although related party creditors have the same rights to those of general creditors, their interests would lie with the applicant. As related entities, they would surely want the proposed scheme to be successful. In this case, the proposed director that was appointed was suggested based on the approval of several creditors which were all related parties to the applicant and should not have been included as part of the general creditors of the applicant, but included as part of a separate group of creditors who were identified as related party creditors. Nevertheless, even if this court was to ignore this defect, the said appointment did not meet the threshold as required by s. 368(2) of the CA which was mandatory, cannot be excused or disregarded. The total value of the claims of these creditors was RM292,927,675.88. Their total debt does not exceed 50% total in value of creditors as required under s. 368(2) of the CA. (paras 29-34)

(3) The first and second interveners had shown that their total claim exceeded 30% of the total debts admitted by the applicant. They both had indicated that they would oppose the proposed scheme of arrangements as it appeared before the court. The said interveners were adamant that the same was not fair and not in the best interest of the creditors as a whole. In view of their objection, it was found that the proposed scheme would not succeed and bound to fail. Section 366(3) of the CA is crystal clear in that for any scheme of arrangements to succeed and be binding on any creditors, it must be agreed to by 75% of the total value of creditors. Hence, considering this and the finding that s. 368(2) of the CA had not been complied with by the applicant, the restraining order was set aside. Costs of RM25,000 was granted to the first and second interveners subject to allocator. (paras 36-38, 41 & 43)

Case(s) referred to:

Airasia X Bhd v. BOC Aviation Ltd & Ors [2021] CLJU 188; [2021] 1 LNS 188 HC ***(refd)***

Barakah Offshore Petroleum Bhd & Anor v. Mersing Construction & Engineering Sdn Bhd & Ors [2019] CLJU 551; [2019] 1 LNS 551 HC ***(refd)***

Eastern Pretech Pte Ltd v. Kin Lin Builders Pte Ltd [2004] SGHC 195 ***(refd)***

In Re Sumatec Resorts Bhd & Anor [2011] CLJU 1538; [2011] 1 LNS 1538 HC ***(refd)***

Intrakota Komposit Sdn Bhd & Anor v. Sogolease Advance (M) Sdn Bhd [2004] 8 CLJ 276 HC ***(refd)***

Lagenda Erajuta Sdn Bhd v. Acre Square Sdn Bhd & Ors [2020] CLJU 698; [2020] 1 LNS 698 HC ***(refd)***

Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another Case [2018] 10 CLJ 412 HC ***(refd)***

Mansion Properties Sdn Bhd v. Sham Chin Yen & Ors [2021] 1 CLJ 609 FC ***(refd)***

MDSA Resources Sdn Bhd v. Adrian Sia Koon Leng [2023] 7 CLJ 843 FC ***(refd)***

Re Ng Huat Foundations Pte Ltd [2005] SGHC 112 ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1989] CLJU 145; [1989] 1 LNS 145 HC ***(refd)***

The Royal Bank Of Scotland NV v. TT International Ltd [2012] SGCA 9 ***(refd)***

Twenty First Century Oils Sdn Bhd v. Bank Of Commerce (M) Bhd & Ors (No 2) [1993] 2 CLJ 677 HC ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 366(2), (3), 368(1), (2)

For the applicant - Gary Ng Cheng Yip & Foong Kar Yee; M/s Dennis Nik & Wong

For the 1st respondent - HY Chong, Malarvili Kunasegeran & Goh Ming Qiu; M/s Azman Davidson & Co

For the 2nd respondent - S Suhendran, Khor Yongshi, Rodney Gan & Leong See Teng; M/s Sanjay Mohan

For the 3rd respondent - Chia Oh Sheng & Athena Chan; M/s Lee Hishammuddin Allen & Gledhill

Reported by Syamim Ariffin

JUDGMENT

Mohd Arief Emran Arifin J:

Introduction

[1] The applicant is a company in the business of property development and is a wholly owned subsidiary of KSK Land Sdn Bhd. The ultimate holding company of KSK Land Sdn Bhd is KSK Group Berhad. The applicant wholly owns several subsidiaries including Infinite Holding Sdn Bhd and Delta 8 Sdn Bhd.

[2] The applicant launched a mixed development project known as 8 Conlay situated in the heart of Kuala Lumpur.

[3] The applicant contends that it was unable to complete the said project within the timeline due to the COVID-19 pandemic, the Movement Control Orders restrictions by the Government of Malaysia and the contractual dispute it now faces with its contractors.

[4] It now claims that it is suffering significant cash flow issues and that its revenue is adversely reduced with costs continue to increase, leading to the depletion of its cash reserves.

[5] The statement of affairs of the applicant as of 22 August 2023 discloses that the estimated realisable value of the assets stands at RM248,707,453 whilst the amount admitted being due to its creditors stands at RM783,981,096.

[6] The applicant has sought the assistance of professionals to undertake and plan a restructuring plan. The applicant contends that they have appointed Baker Tilly Insolvency PLT as its scheme advisor to formulate a scheme of arrangements to address its financial predicament. The applicant also contends that they have started talks with potential white knights to revive, rehabilitate and complete the project.

[7] In the circumstances, the applicant applied for a restraining order under s. 366 and s. 368 of the Companies Act to enable it to have the proposed scheme to be brought to the attention of the creditors for their consideration and approval.

[8] An order was made by Liza Chan J on 1 September 2023, allowing the applicant's application to allow the application to hold a meeting of creditors under s. 366 of the Companies Act to consider the restructuring scheme proposed that must be held within 180 days from 1 September 2023 and that a restraining order is entered against any creditors of the applicant from filing any proceedings for a period of three months from 1 September 2023.

[9] The above order was extended by Wan Muhammad Amin J to a period until 30 January 2024.

Application For Intervene And Setting Aside The Restraining Order

[10] MCC Overseas (M) Sdn Bhd, Grand Dynamic Builders Sdn Bhd and Malayan Banking Berhad have sought to intervene in these proceedings as creditors who will be affected by the outcome of these proceedings. The applications to intervene were not objected to by the applicant. This court has since allowed the application to intervene by these creditors.

[11] MCC Overseas (M) Sdn Bhd and Grand Dynamic Builders Sdn Bhd have also sought to set aside the restraining orders entered on 1 September 2023.

Applicable Law Concerning An Application To Restructure Debts And To Restrain Creditors Under Section 366 And Section 368 Of The Companies Act?

[12] A company in financial distress may apply to restructure its debts pursuant to a scheme or arrangement that will be proposed to its creditors at a meeting and in the interim seek protection from any creditors' legal action under s. 366 and s. 368 of the Companies Act.

[13] One of the main requirements for any such compromise agreement to be binding on all the creditors, class of creditors, members or class of members, the company or the liquidator or contributories, is that the scheme of arrangement must be agreed to by 75% of the total value of the creditors or class of creditors or class of members present and voting at the said meeting and this is subsequently approved by the court. This appears in s. 366(3) of the Companies Act.

[14] As I have stated above, the company, where there has been a proposed scheme of arrangement with its creditors, may apply to restrain any proceedings against it to enable the company to present the said proposal to its creditors for consideration. This power is provided for in s. 368(1) of the Companies Act.

[15] The restraining order must, however, not be for a period of not more than three months subject to extension of not more than nine months. However, it must be shown that:

(i) there exists a proposal for a scheme of arrangement between the company and its creditors representing at least one-half of all the creditors.

(ii) the court is satisfied that the restraining order is necessary to enable the company and its creditors to formalise the scheme of arrangement for the approval of the creditors.

(iii) a statement of particulars as to the affairs of the company of not more than three days before the application is lodged together with the application.

(iv) the court approves the person nominated by a majority of the creditors to act as a director.

This appears in s. 368 of the Companies Act.

[16] The Federal Court in *MDSA Resources Sdn Bhd v. Adrian Sia Koon Leng* [2023] 7 CLJ 843 clarified, (i) how our courts are to treat related parties and classification of creditors and (ii) what needs to be disclosed in the explanatory statements.

[17] Nordin Hassan FCJ, delivering the judgment of the majority of the Federal Court stated:

> (i) Treatment of Parties and on the issue of classification of creditors
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> [32] Based on the authorities cited above, *a wholly-owned subsidiary or related party of a company that proposed a scheme of arrangement under the CA should not be placed in a single class of creditors due to their special interest in promoting the scheme. There is no community of interest between the subsidiary and the other creditors. Further, I am of the view that the weight to be attached to the related parties' votes is also pertinent in the classification of the class of creditors. What is the purpose of placing the related parties' creditors in the single class with other creditors if, at the end of the day, their votes are discounted or given less weight at the sanction stage? This affects the result of the voting at the meeting stage and the voting would only be an exercise in futility. This issue will be discussed further in this judgment*.
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> (ii) Duty to disclose all material facts by the company/applicant
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> [54] No doubt that the court has the power to order further meetings of creditors and to furnish the relevant particulars needed by the creditors by having an amended explanatory statement. That is not the point here, the scheme company, the appellant, should not withhold any material information that affected the decision in the voting even at the meeting stage. This is prejudicial to the creditors in deciding to vote for or against the proposed scheme, in particular those who did not attend the meeting after reading the explanatory statement which lacked of the material particulars. In *The Royal Bank of Scotland* case (*supra*) this was said:
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> > ... Disclosure of material information about the scheme or the company's affair ought not to be deliberately withheld until the meeting so as to influence its outcome. This would unfairly prejudice those who may have decided not to attend after considering the information sent to them earlier and will likely be seen as an attempt to improperly influence the voting outcome.
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> [55] The appellant also should not rely on technicalities in withholding any material information if the proposed scheme is truly fair and reasonable to all creditors.
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> (emphasis added)

[18] The Federal Court also unequivocally stated that the role of the court is to consider whether the sanction of such a scheme is fair and reasonable to all creditors. The court stated:

> [59] One of the important criteria in sanctioning a proposed scheme of arrangement by the court is that the scheme is reasonable and fair to all creditors and the test is whether the proposed scheme is a scheme that an intelligent and reasonable man would approve.

[19] I also refer to the decision of Ong Chee Kwan JC in *Airasia X Bhd v. BOC Aviation Ltd & Ors* [2021] CLJU 188; [2021] 1 LNS 188; [2021] 10 MLJ 942, where on the issue classification of creditors required under s. 366 and s. 368 of the Companies Act had this to say:

> [47] The task of classifying the creditors must be taken seriously and the applicant assumes the risks of the application being dismissed at the Convening Stage if the classification is found wanting as the Court has no jurisdiction to sanction the proposed scheme if the creditors' meeting(s) are not properly constituted. The jurisdiction of the Court is conditional upon the correct identification and composition of classes, for it is only when approved by the appropriate classes, properly identified, selected and convened that the majority could bind the company (See: *UDL Argos Engineering & Henry Industries Co Ltd v. Li Oi Lin* [2001] 3 HKLRD 634 at [27(5)] ('*UDL Argos*'), *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and other v. TT International Ltd and another appeal* [2012] SGCA 9 ('*Royal Bank of Scotland*'); *Re Apcoa Parking Holdings GmbH* [2015] 2 BCLC 659 at 674, para [45] ('*Re Apcoa*')).
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> [48] Although the issue of creditors' classification was once thought better left to be determined at the Sanction Stage (See: Lord Millet's view in the Hong Kong Court of Final Appeal case of *UDL Argos*), the more recent and prevailing views are that this should now be taken at the Convening Stage. More specifically, in *Royal Bank of Scotland*, VK Rajah JA at para [60] to [62] said:
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> > 60. Lord Millet NPJ's view in the Hong Kong Court of Final Appeal case of *UDL Argos*, which suggests that issues of creditors' classification should rather be left to the sanction hearing (see below at [70]) should also be noted. This particular view was grounded on the belief that processes seeking to address those issues earlier could prematurely attract contentious legal proceedings which might otherwise have been avoidable (see *UDL Argos* at [14]):
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> > It might be thought singularly unhelpful to leave the question whether the meetings were correctly convened to the third stage, by which time a wrong decision by the company at the outset will have led to a considerable waste of time and money. But in my opinion the practice is a sound one. The only alternative would be to require notice of the initial application to be made *inter partes* and for notice of the application together with a copy of the Scheme

to be given to everyone potentially affected by it, with the risk of incurring the costs of a contested hearing and possible appeals before it could be known whether the Scheme was likely to attract sufficient support in any event. The present practice ensures that those advising the company take their responsibility seriously, since an error on their part will be fatal to the Scheme. At the same time it leaves the question, which goes to the jurisdiction of the Court to sanction the Scheme, to be decided at the appropriate time, that is to say when the Court is asked to sanction it. By then the outcome of the meeting or meetings will be known and the question, which will no longer be hypothetical, can be argued between the appropriate parties, that is to say the company on the one hand and those who object to the Scheme on the other.

61. While Lord Millet NPJ's view certainly has some force, it seems to us that it avoids the classic chicken and egg conundrum facing every applicant. Indeed, without a preliminary determination of the correct classification of creditors, how can it be known whether a scheme is likely to attract sufficient support and subsequently pass muster? Further, if it were certain from the outset that certain opposing creditors would be classified separately so that the scheme would never pass, then it would be a futile exercise to even conduct scheme creditors' meetings. The reality of what happens in practice has also to be factored into this dynamic process. Almost invariably, the applicant would have made the effort to ascertain, as best as it could at an early stage, prior to any court application, how particular creditors might be inclined to vote.

62. Concerns about delays and contentious proceedings at an early stage may be somewhat overstated as the court has complete carriage over timelines and the conduct of the proceedings. In our view, even if there is a need at this stage to hear potentially dissenting creditors, such a hearing could usually be conducted expeditiously and summarily. Having considered the relative advantages of both approached, we are inclined to prefer the approach in the Practice Statement which commends itself for the greater degree of certainty it injects into the process of passing a scheme. The adoption of this procedure in Singapore requires the company's solicitors, when applying for an order to summon the scheme creditors' meeting, to unreservedly disclose all material information to the court to assist it in arriving at a properly considered determination on how possible need for separate meeting for different classes of creditors ought to be unambiguously brought to the attention of the court hearing the application. As time is ordinarily if the essence in such applications, all scheme related matters (including appeals therefrom) should be heard on an expedited basis.

[49] I would emphasise again that the decisions that are taken by the Court as to the composition of classes at the Convening Stage is not to be treated as final and the Court is not bound by its decision made at the Convening Stage See: *Re Apcoa* at p. 673, para [42] to [43] where Hildyard J said:

> [42] The principal jurisdiction question at the Convening Hearing is normally the identification of the appropriate classes for the purpose of convening meetings to vote upon the scheme proposals; but other matters going to jurisdiction of the court may also be raised, and it is obviously optimal that any such matters be adjudicated, if possible, since if the court lacks jurisdiction there is no point in any class meetings at all.
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> [43] It is, however, important to emphasise that the function of the court at the Convening Hearing is a limited one; and its decision, even on the question as to the composition of classes, is not final, even though the court can be expected not to change its mind of its own, at the third stage on matters it decided at the first stage (since to do so would tend to subvert the purpose of the revised practice).

e. Test of Classification of Creditors

[50] The classic test for identifying classes is formulated by Bowen LJ in *Sovereign Life Assurance Co v. Dodd* [1892] 2 QB 573 ('*Sovereign Life*') that a class *'must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'*. (emphasis added)

[20] I also note that this court should also consider whether the scheme is more than likely to fail. As counsels put it, that on the face of the affidavits before the court, it is bound to fail. This could arise in situations where the requisite approval at the scheme meeting will not be successful, as more than 25% of the creditors have indicated that they will not agree to the scheme.

[21] I refer to the following cases that are persuasive on this issue:

(i) *Intrakota Komposit Sdn Bhd & Anor v. Sogelease Advance (M) Sdn Bhd* [2004] 8 CLJ 276; [2004] MLJU 588:

> ... The court will not permit a scheme which is not viable, feasible, workable or intelligible from being put before the creditor because to do so would be a waste of time **since the creditor would certainly reject the proposal** ... (emphasis added)

(ii) *The Royal Bank Of Scotland NV v. TT International Ltd* [2012] SGCA 9:

> [64] Second, it should be borne in mind that *where there is no realistic prospect of a scheme receiving the requisite approval, the court should not act in vain in granting the application for meetings to be convened*: see *Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112 at [9]. This is something

that the applicant's solicitors and the proposed scheme manager should take into account prior to making an application for leave to convene a scheme creditors' meeting. *A failure to make a conscientious assessment of the likely prospects of scheme approval may result in adverse costs orders.* (emphasis added)

(iii) *Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another Case* [2018] 10 CLJ 412; [2019] 8 MLJ 473:

[104] ... Accordingly, much as I sympathise with the applicant's plight and its attempt to rehabilitate the company, *the proposal is an exercise in futility, as more than 25% of the total value of creditors will vote against any scheme, and the applicant will not achieve the requisite majority of creditors ...*

[105] As the court will not act in vain, I have allowed the respondent's application and set aside the JMO with costs of RM5,000 to be paid by the applicant subject to allocator.

(emphasis added)

[22] In an application to set aside a restraining order granted earlier or even where the creditors appear in an application to oppose a scheme of arrangement or a restraining order applied, this court must therefore consider the possibility of the said scheme of arrangement being opposed and whether it is even possible to pass the required statutory threshold.

[23] This can be seen from the following authorities cited to this court:

(i) *Eastern Pretech Pte Ltd v. Kin Lin Builders Pte Ltd* [2004] SGHC 195:

[6] At the hearing on 21 July 2004, having meanwhile been served Jong's affidavit of 7 July 2004, *the creditors represented at the hearing informed the court that they would not support the proposed scheme of arrangement.* These creditors included the major creditors Eastern and Bintai earlier referred to. A count was taken of the debts owed to the supporting creditors and the percentage of the Company's total unsecured debts that they represented. *Both on a gross and net basis, the supporting (sic.) creditors exceeded 25% of the unsecured creditors ... This meant that if the scheme of arrangement were to be put to the vote at a meeting of creditors pursuant to s 210 of the Companies Act, it would certainly be defeated.* This would be the case even if we were to assume that all other unsecured creditors were to vote in favour of the scheme of arrangement. ... Be that as it may, ... the debts owed to these creditors were certainly a minority and far from the requisite majority of creditors to whom 75% of the unsecured debts must be owed.) ...

[8] I took into account the following:

... (c) That allowing the Company to drag on, defending the numerous suits against it, and to seek in vain to enter into a scheme of arrangement, would fritter away the scant financial resources of the Company at the expense of creditors.

(emphasis added)

(ii) *Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112:

> [7] *I was also informed by both counsel of the two opposing creditors that they collectively represented 34% in value of the creditors and their clients would definitely vote against the scheme.* Under s. 210(3) of the Act, among other things, a majority in number representing three-fourths in value of the creditors, voting in person or by proxy, have to vote in favour of the scheme at the meeting ordered by the court before the scheme of compromise can bind all the creditors of the applicant. *In the result, it was not seriously disputed before me that the applicant would not have been able to have the scheme approved, so that it would be legally binding on all its creditors.*
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> ...
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> [9] *I did not think that there was any prospect of the scheme receiving the approval of the requisite three-fourths in value of the creditors. I did not think that a court should act in vain.* (emphasis added)

(iii) *Twenty First Century Oils Sdn Bhd v. Bank Of Commerce (M) Bhd & Ors (No 2)* [1993] 2 CLJ 677; [1993] 2 MLJ 353:

> That aside, even if the meeting was allowed to be held, with the same objections canvassed thereat, it would certainly result in the proposed scheme being rejected. *It was more proper and logical, therefore, not to have the scheduled meeting at all. ...*
>
> On these considerations, *I could only conclude that no purpose would be served under these circumstances in holding the proposed meeting ...* (emphasis added)

[24] I do note that the counsels for the interveners/respondents also argue that this court should consider that as the scheme is not clear and is conditional on events occurring beyond the control of the company, it is clearly not to the benefit of the creditors and should not allow the restraining order or even entertain the proposed scheme.

[25] Learned counsels for the interveners/respondents rely on the decision of the High Court in *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1989] CLJU 145; [1989] 1 LNS 145; [1990] 2 MLJ 31.

[26] I have no qualms with the argument of counsels on this issue that this court should consider the merits of the scheme before it is endorsed. However, I do not believe that this issue is an alive issue at this stage as that will have been considered by the creditors and considered subsequently by this court when the final scheme is passed in accordance with s. 366 of the Companies Act and is brought before this court for endorsement. It is at this stage will this issue be considered, and I do not believe that I should go on the merits of the scheme at this stage.

[27] Nonetheless, I agree that this court should consider whether the mandatory requirements of s. 366 and s. 368 have been complied with, in particular s. 368(2) of the Companies Act and whether the scheme is bound to fail as it would not past the threshold required under s. 366(3) of the Companies Act.

Decision Of This Court – Enclosure 10 And Enclosure 28 Failure To Comply With Statutory Requirements

[28] Having considered the affidavits and the submissions filed by the parties, I find that the interveners/respondents have shown to me that the mandatory requirements of s. 368(d) of the Companies Act was not complied with by the company/applicant. Also see *Lagenda Erajuta Sdn Bhd v. Acre Square Sdn Bhd & Ors* [2020] CLJU 698; [2020] 1 LNS 698.

[29] In this case, the company/applicant had wrongly included related companies/parties into the group of creditors. The company/applicant should have categorised these creditors as a separate group of creditors from other independent creditors as these related creditors, interests would not be in line with the interests of other creditors. Related party creditors, although have the same rights to those of general creditors, their interests will lie with the applicant. As related entities, they will surely want the scheme to be successful and this may not be in line with the interests of other creditors. I reiterate what was said by Nordin FCJ in the above cited case:

> a wholly-owned subsidiary or related party of a company that proposed a scheme of arrangement under the CA should not be placed in a single class of creditors due to their special interest in promoting the scheme.

[30] In this case, the proposed director that was appointed was suggested based on the approval of Kua Ying Fei, Tan Sri Kua Kion Koo, KSK Group Berhad, KSK Land Berhad and KCJ Properties Sdn Bhd. These are related parties to the applicant and should not have been included as part of the general creditors of the applicant. These creditors should have been part of a separate group of creditors who are identified as related party creditors as required by law identified earlier.

[31] Furthermore, even if this court is to ignore this defect, the said appointment did not meet the threshold required by s. 368(2) of the Companies Act.

[32] This requirement is mandatory and cannot be excused or disregarded by this court as seen in the judgment of the Federal Court in *Mansion Properties Sdn Bhd v. Sham Chin Yen & Ors* [2021] 1 CLJ 609; [2021] 1 MLJ 527.

> [50] This view is further fortified when the matter is considered in the light of other sub-sections in s. 368 of the CA. Section 368(2)-(7) of the CA imposes a number of specific statutory safeguards in respect of restraining orders under s. 368(1). Among others, these include:

A (a) the pre-conditions for the court to grant a restraining order to a company under s. 368(1) of the CA. The court must be satisfied that there is a proposal for a scheme of arrangement, that the restraining order is necessary to enable the company and its creditors to formalise the scheme for approval, that a statement of particulars as to the affairs of the company is lodged together with
B the application, and **that the court approves or appoints a person nominated by the majority of creditors to act as director (s. 368(2))**; ...

[51] **These statutory requirements are mandatory** and any non-compliance may render the restraining order liable to be set aside for irregularity
C (see *Pelangi Airways Sdn Bhd v. Mayban Trustees Bhd*). (emphasis added)

[33] The total value of the claims of the creditors identified in para. 30 earlier is to the sum of RM292,927,675.88. Their total debt does not exceed the 50% total in value of creditors required under s. 368(2) of the Companies Act. This could be seen in the computation below.

D *Based On Total Scheme Creditors*

RM292,927,675.88/RM1,146,568,856 x 100% = 25.55%

Based On Total Unsecured Creditors

E RM292,927,675.88/RM956,127,278.69 x 100% = 30.64%

(Note – On the issue of what is meant by "a majority of creditors" I refer to the decision of Nallini Pathmanathan J (as she then was) in *In Re Sumatec Resorts Bhd & Anor* [2011] CLJU 1538; [2011] 1 LNS 1538, where Her Ladyship held that this should mean a majority in value of the creditors.)

F **[34]** Therefore, having failed to even comply with the statutory requirements under s. 368(2) of the Companies Act, the said restraining order is void *ab initio* and should be set aside. The applicant has failed to comply with a statutory requirement for a restraining order could be granted by this court.

G **[35]** If any further authority is needed to buttress the above, I find no better assistance than to quote the judgment of Darryl Goon J (as he then was) in *Barakah Offshore Petroleum Bhd & Anor v. Mersing Construction & Engineering Sdn Bhd & Ors* [2019] CLJU 551; [2019] 1 LNS 551; [2019] MLJU 338, where he stated:

H [71] Having regard to the foregoing, the Court is of the view that upon its proper construction, **the conditions set out in section 368(2)(a) to (d) need to be complied with when an application is made for a restraining order under section 368(1) of the Companies Act 2016**. Such a result is consonant with the plain language used and the legislative intent and
I purpose for the conditions in section 368(2)(a) to (d).

> [72] As the Applicants have conceded that the conditions in section 368(2)(c) and (d) were not complied with when making and securing the *ex parte* Order, the Restraining Order granted therefore cannot stand.
>
> (emphasis added)

The Scheme As It Stands Will Not Even Past The Threshold Of Section 366(3) Of The Companies Act

[36] Even if I am wrong on the above, both interveners have shown to this court that their total claim exceeds 30% of the total debts admitted by the applicant.

[37] The interveners/respondents have indicated that they will attend and oppose the scheme as it appears before this court. They are adamant that the scheme is not fair and is not in the best interest of creditors as a whole.

[38] In view of their objection, I find that the scheme will not succeed and is bound to fail. Section 366(3) is crystal clear that for any scheme to be binding on any creditors, it must be agreed to by 75% of the total value of creditors.

[39] I rely on the earlier authorities and further refer to the decision of the Singaporean courts that I find are persuasive on this issue. They are:

(i) *Eastern Pretech Pte Ltd v. Kin Lin Builders Pte Ltd* [2004] SGHC 195;

(ii) *Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112.

[40] I do appreciate the arguments that were raised by counsel for the applicant's in their written submissions. I do understand that perhaps the scheme was a *bona fide* proposal to salvage the applicant and to address the financial burden faced by the applicant and revive it.

[41] However, as the statutory requirements of s. 368 was not complied with, this court has no choice but to set aside the restraining order. This obligation is mandatory and cannot be excused irrespective of any excuse given by the applicant.

[42] I also grant costs of RM25,000 to the first and second interveners as they have shown that on the face of the proposal/scheme, the applicant has failed to comply with the requirements of the Companies Act.

Orders Of This Court

[43] For the above reasons, I make the following orders:

(i) interveners application in encls. 10, 12 and 13 are allowed with no order as to cost; and

(ii) setting aside application in encls. 10 and 28 are allowed with costs of RM25,000 to be paid by the applicant to each of the interveners subject to the allocatur.